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IN THE

Supreme Court of the United States

October Term, 1965

No. 887

WALTER FRANCIS RIGGAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The conviction of the petitioner was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Riggan* v. *Commonwealth,* 206 Va. 499, ... S.E. 2d ..... (1965). The judgment was entered on October 11, 1965.

QUESTIONS PRESENTED

(1)

Was the affidavit upon which the search warrant was issued sufficient?

(2)

Where no evidence is introduced which has been obtained by use of a wire tap has the petitioner been deprived of a constitutional right under the Fourth Amendment to the Constitution of the United States?

STATUTE INVOLVED

Section 18.1-340 of the Code of Virginia, 1965 as amended:

If any person:

(1) Set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value.

(2) Knowingly permit such lottery in any house under his control * * *

* * *

Shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars.

STATEMENT

The petitioner, Walter Francis Riggan, was found guilty of operating a lottery, known as the Numbers Game, in violation of Section 18.1-340 of the Code of Virginia, 1950 as amended.

The petitioner now seeks to attack this conviction by attacking the sufficiency of the affidavit in support of the warrant and in having this Court determine that the mere use of the word "wire tap," where no evidence is presented as a result of a wire tap, is in violation of the Fourth Amendment to the Constitution of the United States.

The affidavit in support of the search warrant in Provision No. 2 stated, "personal observation of the premises and information from sources believed by the police department to be reliable." However, the Record before the Supreme Court of Appeals contained specifics which were brought out by petitioner to explain the language used in Provision No. 2. These specifics appear in the Court's opinion and will not be elaborated upon here.

While petitioner in the trial court below sought to get evidence before the jury which had been obtained from a wire tap, the Record and Opinion of the Supreme Court of Appeals clearly and unequivocally show that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap.

REASONS FOR REFUSING THE WRIT

I.

The Affidavit was Sufficient to Constitute Probable or Reasonable Cause for the Issuance of the Search Warrant.

The affidavit[1] upon which the search warrant was issued

---

[1]

[Affidavit]

Commonwealth of Virginia:
County of Arlington, to wit:

Before me, ..., Judge of County Court for the County aforesaid, this day appeared ..... Officer William K. Stover ..... and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made. ..... Operation of a lottery, to-wit, numbers game, in violation of Section 18.1-340 of the Code of Virginia, as amended. .....

is attacked by the petitioner as being nothing more than a naked conclusion of the elements of the crime of the operation of a lottery. This bold assertion of petitioner is not, however, supported by the argument in his petition.

To the contrary, the affidavit was sufficient to constitute probable or reasonable cause for the issuance of the search warrant and such sufficiency was clearly and succinctly set forth in the opinion of the Virginia Supreme Court of Appeals in *Riggan* v. *Commonwealth,* 206 Va. 499, ... S.E. 2d ..... (1965), viz:

> "[1] First, defendant challenges the sufficiency of the affidavit upon which the search warrant was issued. Officer Stover stated the following material facts in the affidavit as constituting probable cause for the issuance of the warrant: 'Personal observation of the premises and information from sources believed by the police department to be reliable.' Defendant says that the uncontroverted testimony revealed that Stover did not have the premises under personal observation. He further states that there was 'no evidence of any re-

(2) The materials facts constituting probable cause for issuance of the warrant. ..... Personal observation of the premises and information from sources believed by the police department to be reliable. .....

(3) What is to be searched for under the warrant? ..... Lottery tickets, including numbers slips, and any gambling paraphernalia made, provided or procured (sic) for drawing a lottery. .....

(4) The house, place, vehicle, or baggage to be searched. ..... All of a certain premises known as Apartment 604C, 3000 Spout Run Parkway, Arlington County, Virginia. .....

Signature of Affiant ..... William K. Stover ..... Subscribed And Sworn To before me this ..... 22nd ..... day of Jan. ..... 1963.

..... Paul D. Brown .....
Judge

Certified to the Clerk of the Circuit Court of Arlington County

..... Paul D. Brown .....
Judge

liable character to suggest that defendant was engaged in any numbers operation.' Hence, he argues, the affidavit and warrant were void. We find these contentions to be without merit.

Stover did testify at the hearing on the motion to quash that he personally did not have the individual apartment (604C) under observation until after he had obtained the search warrant and just before the raid. However, the uncontradicted evidence shows that he had the apartment building under surveillance. Stover testified that on three occasions during the months of December, 1962 and January, 1963 he personally observed Riggan 'come and go' from the apartment building. Apartment 604C was a part and parcel of this building.

The police department first became suspicious of the activities in apartment 604C after an investigation was made therein as a result of a child falling out of one of the windows. Later, in November, 1962, officer Hartel went to apartment 604C to execute a warrant of arrest on Riggan for assault. On this occassion Carmen Nodarra came to the door and asked Hartel if he had a search warrant for the premises. After Hartel informed her of the warrant for Riggan's arrest she closed the door, and there was considerable delay and 'scurrying around' in the apartment before he was permitted to enter and execute the warrant on Riggan. After he entered, Hartel observed some telephones in a closet which had been cut from their wires, and he made a report of the situation to the police department. Stover had knowledge of this report and the vice squad commenced an investigation of the activities in the apartment. Stover testified that in addition to his personal observation of the premises he received information from two informants and two police officers that a lottery was being conducted in apartment 604C. He stated that he believed these sources to be reliable, and there was no showing that such sources were not reliable.

In the recent case of *Tri-Pharmacy, Inc.* v. *United States,* 203 Va. 723, 127 S.E. 2d 89 (cert. den. 371 U.S. 962, 9 L. ed. 2d 509, 83 S. Ct. 542) an attack was made on an affidavit similar to the one here in question. The affidavit read in part: 'The material facts constituting probable cause for issuance of the warrant. Personal observation of premises and information from sources thought by the Police Department to be reliable.' We held that the affidavit alleged sufficient facts to constitute probable cause for the issuance of the search warrant; that the warrant was valid, and that the evidence obtained as a result of the warrant was admissible. In that case Mr. Justice Buchanan, speaking for the court, discussed at some length the law relating to the sufficiency of an affidavit to constitute probable cause for the issuance of a search warrant. It will serve no useful purpose to restate those principles, but reference to them is hereby made. (203 Va. at pp. 727-730.)

We are not unmindful of the recent case of *Aquilar* v. *Texas,* 378 U. S. 108, 12 L. ed. 2d 723, 84 S. Ct. 1509, not cited in the present case by either party. There, the affidavit given by police officers to obtain the search warrant recited in part: 'Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law.' By a divided court it was held that the affidavit did not provide a sufficient basis for a finding of probable cause; that the search warrant should not have been issued, and that the evidence secured as a result of the warrant was not admissible.

The *Aquilar* case and the case at bar are distinguishable. The affidavit in *Aquilar* was based solely upon hearsay information, whereas in the present case the affidavit recited 'personal observation of the premises' as well as 'information from sources believed by the police department to be reliable.'

> We hold that the evidence shows that Stover personally observed the premises as stated in the affidavit; that the sources of information concerning the operation of the lottery were shown to be reliable; that the affidavit was sufficient to constitute probable or reasonable cause for the issuance of the search warrant, and that the court did not err in refusing to quash the affidavit and search warrant."

Petitioner cites as authority for his attack on the affidavit several cases, all of which are distinguishable from the case at bar.

In *Giordenello* v. *U. S.*, 357 U. S. 480, the petitioner was convicted of the unlawful purchase of narcotics after a trial without a jury before a Federal District Court of Texas. The Court of Appeals affirmed. It was held by the United States Supreme Court that the arrest and seizure was illegal, the narcotics should not have been admitted in evidence, and the conviction must be set aside. The Supreme Court held that under Rules 3 and 4 of the Federal Rules of Civil Procedure, read in the light of the Fourth Amendment, probable cause was not shown by the complaint and the arrest warrant was issued illegally.

A Federal officer obtained a warrant for petitioner's arrest on his own complaint but failed to obtain a search warrant. His complaint was not based on his personal knowledge, did not indicate the source of his belief that petitioner had committed a crime and set forth no other sufficient basis for a finding of probable cause. With only this arrest warrant, he arrested petitioner and seized narcotics in his possession.

This case is clearly distinguishable from the case at bar wherein a search warrant was obtained by police. In addition thereto, it was quite clear from the evidence adduced at the trial that the officer involved in the case at bar (*Riggan*

case) had personally observed the premises and obtained information from reliable sources, whereas in this case there was no evidence of such action by the police.

The case of *Nathanson* v. *U. S.*, 290 U.S. 41 (1933) involved a prosecution under the National Prohibition Act for unlawful possession of intoxicating liquors. A warrant was issued by a State judge to a customs agent to search a private dwelling. The questioned warrant expressly stated that the officer under oath "had cause to suspect and does believe" that certain merchandise was within the premises of the petitioner. It was held that under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. The Court stated that mere affirmance of belief or suspicion is not enough. Consequently, petitioner's conviction was reversed.

This case can be distinguished from *Riggan* in that the search warrant was clearly insufficient to show probable cause because the customs agent (officer herein) merely stated under oath he "had cause to suspect and believed" these prohibited intoxicating liquors were in petitioner's possession. The customs agent had no other reason to request issuance of the warrant. However, in the *Riggan* case the officer making the affidavit was shown to have had the building under personal observation, seeing the defendant go in and out. In addition, the facts show he was supported by other police officers who had entered the apartment and observed evidence of a numbers game being conducted.

In *U.S.* v. *Ventresca*, 380 U.S. 102 (1965) the respondent was convicted of possessing and operating an illegal distillery in the U. S. District Court. His conviction was reversed by the Court of Appeals which held the warrant insufficient to

establish probable cause. This decision was reversed by the Supreme Court by its holding that the affidavit amply showed facts to establish probable cause to support the issuance of the search warrant.

An Investigator for the Alcohol and Tobacco Tax Division made an affidavit stating his belief, on the basis of his own observation, as well as observations and investigations of others, that there was an illegal distillery operation in respondent's house. A description of events leading up to time of the arrest was set out in the affidavit such as cars being driven to the rear of respondent's house with loads of sugar or empty cans, the loading of apparently full five-gallon cans, the smelling by investigators of fermenting mash as they walked in front of the house and their hearing the sound of a motor pump and metallic noises from the direction of the house.

In petitioner's brief on page 7 he cites some of the language of this Court in *U. S.* v. *Ventresca.* That language is followed by the following remarks by the Court: "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

It is submitted that in the present case the circumstances in the affidavit were sufficiently set forth, as well as the sources of information, and the magistrate found "probable cause" to issue the search warrant. The affidavit herein should be construed in a commonsense manner.

II.

None of the Information Received from the Wire Tap Was Used in Connection with the Issuance of the Warrant or the Execution of the Raid in any way, and no Evidence was Introduced at the Trial which had been Obtained by means of the Wire Tap.

The Record below and the Opinion of the Supreme Court of Appeals of Virginia show categorically that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap.

This is succinctly set forth on pages 504-5 of the opinion, viz:

> "[2] Defendant next contends that since there was a wire tap by officers Kadel and Hughes shortly before the raid none of the evidence obtained as a result of the raid should have been admitted. Out of the presence of the jury, Hughes read from some skimpy notes he had taken during the wire tap concerning conversations he had intercepted which indicated that a lottery was being operated and that 'Marian' was coming to the apartment that afternoon. It devloped that 'Marian' was the person (Marian Williams) who appeared at apartment 604C and caused the door to be opened just before the officers entered to make the raid. Defendant argues that the officers secured information by means of the wire tap which they did not previously have and which they vitally needed 'as to possible activities in that apartment.'
>
> Prior to the jury trial the court granted defendant's motion to suppress evidence obtained under the illegal wire tap and overruled his motion to quash the search warrant and to suppress evidence obtained thereunder.
>
> The record clearly shows that the search warrant was issued hours before the wire tap; that the officers

had confidential information before the wire tap that someone would appear at the door of apartment 604C, about 4 p.m.; that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap. Hence, the trial court did not err in refusing to suppress the evidence obtained as a result of the raid."

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Response To The Petition For a Writ of Certiorari were mailed, with first class postage prepaid, by me to H. Clifford Allder, 401 Third Street, N.W., Washington, D. C., on the 30th day of March, 1966.

M. HARRIS PARKER